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ABSTRACT

This document examines the Fourth Amendment as the source of search and seizure law; drug testing of school employees; and drug testing searches of students. The United States Supreme Court case that established the two-part test to determine the legality of a student search is discussed, three separate student drug testing programs that have been challenged in court are described, and the reliability of urinalysis to determine substance use is reviewed. (CLA)

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A Legal Analysis

September 1989

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Drug Testing and Searches in Public Schools

A Legal Analysis

September 1989

This legal analysis examines the Fourth Amendment as the source of search and seizure law; drug testing of school employees; and drug testing and searches of students, including a discussion of the United States Supreme Court case that established the test to determine the legality of a student search.

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Introduction

Drug testing raises legal questions related to individuals' right to be free of unreasonable searches conducted by government at all levels, including school districts. The limits on drug testing in public schools is a problem for school authorities and government officials, especially as society's focus on illicit drug use increases. In an effort to crack down on drug use in the schools, school authorities have used drug tests to determine whether school employees or students are using illicit drugs. In some instances, courts have prohibited drug testing in schools. The legal and practical constraints on drug testing in public schools require school authorities and government officials to carefully weigh individuals' right to privacy against school officials' competing need to obtain information.

Synopsis of Law

Drug tests are searches under the Fourth Amendment to the U.S. Constitution and are unconstitutional if unreasonable. According to the U.S. Supreme Court, the legality of a student search depends upon the reasonableness of the search. In assessing the reasonableness of testing school employees and students for drug abuse, courts generally require individualized suspicion that a person is using drugs. Courts conduct a two part test to determine reasonableness:

(1) was the search justified at its inception; and
(2) was the scope of the search reasonably related to the circumstances that justified it.

The reasonableness standard requires school officials to regulate their conduct according to the dictates of reason and common sense; protecting individual rights must be weighed against maintaining an appropriate, drug-free educational environment. Although there is a temptation to justify group drug testing based on the nature of a position or the responsibilities of a particular group, such testing is generally impermissible within the school environment.

Drug Testing and the Fourth Amendment

The Fourth Amendment to the U.S. Constitution prohibits government entities, including school districts, from engaging in unreasonable searches and seizures.[1] Courts have experienced difficulty in determining what is a reasonable search.[2]

Under the Fourth Amendment, the definition of a search includes requiring an individual to submit to drug testing as a means of detecting drug abuse. Courts have examined the Fourth Amendment limits on drug testing in cases involving jockeys, inmates, military personnel, police officers, fire fighters, corrections officers, electrical workers, customs officers, railway personnel, bus drivers, school bus attendants, teachers, and students.

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[1] The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and persons or things to be seized." In 1961, the U.S. Supreme Court declared that Fourth Amendment protections against unreasonable searches of citizens by their government applied to state as well as federal actions. Mapp v. Ohio, 367 U.S. 643 (1961).

[2] See L. Goering, Constitutional Law: Privacy Penumbra Encompasses Students in School Searches, 25 Washburn L.J. 135 (1985).

When examining the reasonableness of drug testing, courts have attempted to balance individuals' right to privacy with the interest of the state in exposing drug use. The key questions often concern the scope of the justification (i.e. general or individualized suspicion) and the level of the justification (i.e. reasonable suspicion or probable cause) for conducting a search. The justification required for drug testing varies according to an individual's occupation or status. Court decisions on the constitutionality of drug testing have upheld mandatory random drug testing without individualized suspicion in certain instances where security is a paramount consideration (inmates)[3], when an individual is a GI in the U.S. Army's European Command (the expectation of privacy for military personnel is different from that of civilians)[4], or where an industry is pervasively and closely regulated (horse racing)[5]. In the context of public employees performing extremely hazardous work (police officers, fire fighters, corrections officers, electrical workers), courts generally have required some degree of individualized, reasonable suspicion of drug use, while allowing for annual or other specified physical examinations.[6] Some courts have allowed blood and urine tests without individualized suspicion when public safety is at issue (bus drivers, train crews).[7] Other courts have required individualized suspicion that a person uses, possesses or is under the influence of a chemical substance (direct involvement in a serious accident, the concurrence of supervisors) before permitting a blood or urine test to be administered in a reasonable manner.[8]

Drug Testing of Public School Employees

The controversy surrounding drug testing holds significant implications for the public schools. Drug testing policies that require school officials to screen teachers or other school employees place issues of personal freedom and the protection of individual rights in conflict with child

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[3] Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984).

[4] Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975).

[5] Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986), cert. denied, 879 U.S. 986, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986).

[6] See, e.g., Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985) (court likened police work to that of the military but determined that while the public's need for alert and rational police officers outweighed the privacy right of the individual officer, individualized suspicion of drug use was required); Capua v. City of Plainfield, 643 F.Supp. 1507 (D.N.J. 1986) (court distinguished urine testing of jockeys as involving unique circumstances and special safeguards but left open the possibility of a generalized justification for testing crime bureau members and an exception for physical examinations); King v. McMickens, 501 N.Y.S.2d 679 120 A.D.2d 351 (App. Div. 1986) (court held that correction officers' need to perform demanding duties unimpaired by drug use outweighed plaintiffs' expectation of privacy, and individualized suspicion requirement was met when information was received from confidential informant); Allen v. City of Marietta, 601 F.Supp. 482 (N.D.Ga. 1985) (court upheld employer's directive requiring suspected electrical employees to submit to urinalysis testing or risk termination after an increase in on-the-job accidents).

[7] See e.g., Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), cert. denied 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976); Jenkins v. Jones, 833 F.2d 335 (D.C. Cir. 1987), jud. vac. _ U.S. _, 109 S. Ct. 1633, 104L Ed.2d 149, revised on rehearing, 878 F.2d. 1476 (D.C. Cir. 1989). See also cases on public employee drug testing programs sited infra note 14.

[8] See Capua v. Plainfield, supra note 6.

safety, educational productivity and public values about teachers as role models.[9] Drug testing proponents cite dramatic results of aggressive drug screening of military personnel and private sector employees as evidence that drug testing is effective.[10] Drug testing opponents argue that mandatory drug testing is technologically unreliable[11] and constitutionally impermissible.[12]

Federal and state court decisions in the public school context have reached predictable results: drug testing is search and seizure under the Fourth Amendment and generally there can be no drug testing absent reasonable suspicion that an individual is illegally using drugs.[13] In a case involving probationary teachers who were required to submit urine samples for drug testing as a condition of granting tenure, a state appellate court ordered a halt to the testing program. The court held that the Fourth Amendment required some degree of reasonable, individualized suspicion before the privacy of a teacher could be compromised by a compulsory urine test.[14] The court noted, however, that fullscale probable cause and a warrant were not prerequisites to administrative demands that a teacher submit to drug testing. In the case of a school bus attendant who assisted handicapped students, a federal court held that subjecting the attendant to urinalysis as part of a required medical examination was impermissible without individualized suspicion.[15] The court distinguished the role of the attendant from that of school bus drivers and bus mechanics who were directly responsible for children's safety and therefore might expect to be subject to urine and blood tests without individualized suspicion.[16]

According to courts in New York and the District of Columbia, school districts may have drug testing rights in the initial employment phase and over existing employees if a district has

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[9] The object of testing teachers is to determine an individual's fitness to teach. School districts are motivated by an interest in employing physically fit and drug-free teachers, and other school employees, who will help to maintain an appropriate educational environment.

[10] New York Times, June 3, 1986, at 27a, col. 2, If a Company Tests for Drugs (the Department of Defense found that drug usage among enlisted personnel declined by 80 percent after instituting random drug testing for new recruits and the Navy reported a 90 percent decline following adoption of the Defense Department policy.); see also, Washington Post, Aug. 17, 1986, at 5c, col. 4, An Unhealthy Specimen.

[11] Wall Street Journal, Apr. 14, 1986; Nat'l. L.J. Apr. 8, 1986.

[12] See Anable v. Ford, 653 F. Supp. 22 (W.D. Ark. 1985).

[13] The Supreme Court has yet to specifically address the limits on drug testing in the public schools.

[14] Patchogue-Medford Congress of Teachers v. Board of Educ. of the Patchogue-Medford Union Free School Dist. No. 156, 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (N.Y. Ct. of Appeals, 1987). Random testing of teachers is not permitted because the state is unable to safeguard individual rights to privacy, which include the right to be free of unfettered state discretion. Since this decision the U.S. Supreme Court handed down two decisions approving public employee drug testing programs: Skinner v. Railway Labor Executives Association, _ U.S. _, 109 S. Ct. 1402, 103 L. Ed.2d 808 (1989), in which the Court upheld a drug and alcohol testing program for railroad employees involved in train accidents; and National Treasury Employees Union v. VonRaab, _ U.S. _, 109 S. Ct. 1384, 103 L. Ed.2d 685 (1989), in which the Court approved mandatory drug testing of individuals applying for certain U.S. Customs Service positions.

[15] Jones v. McKenzie, 628 F.Supp. 1500 (D.D.C. 1986).

[16] In Jenkins v. Jones, 878 F.2d 1476 (D.C. Cir. 1989), a federal court of appeals ruled that Washington D.C. school officials can legally require drug testing of bus drivers to ensure children's safety. The court stated that concern about children's safety outweighed bus drivers' rights to privacy.

reasonable suspicion that an employee is performing duties under the influence of drugs in violation of district policy[17] or children's safety is at issue.[18] While prospective teachers may anticipate that some school districts may require them to undergo drug testing to determine their fitness to teach, uniform testing among current teachers cannot be justified because the effect of a causeless search may include loss of employment, loss of contractual rights, and possible criminal charges.[19] Exceptions to the requirement of individualized reasonable suspicion may include employment positions where the safety of children is paramount (school bus drivers),[20] annual or other routine medical examinations related to employment,[21] and medical examinations required by collective bargaining agreements.[22]

Drug Searches and Drug Testing of Public School Students

Drug Searches of Students

In New Jersey v. T.L.O.,[23] the U.S. Supreme Court established the standard to be used by courts to determine the legality of drug searches of students by school personnel. The court held that such searches could be conducted with less "probable cause" than that required for police to secure a search warrant. In T.L.O., an assistant principal searched the purse of a 14 year old student who had violated school rules by smoking a cigarette in the school lavatory. The purse contained a package of cigarettes in plain view; the assistant principal uncovered evidence of the student possessing and selling marijuana by searching the zippered compartments of the purse. In response to New Jersey's request to decide whether evidence obtained by a school official in violation of the Fourth Amendment should be thrown out of court, the Supreme Court sought to strike a balance between the interests of the school in maintaining order and the student in retaining some privacy rights. "[The] freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a

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[17] Supra note 15.

[18] Supra note 16.

[19] When New York City school officials proposed a drug testing program for employees suspected of drug use, the United Federation of Teachers listed four conditions it would insist upon before agreeing to a drug testing program: (1) the district possesses irrefutable evidence that an employee's performance is being impaired before a drug test is administered; (2) the test results are accurate and reliable; (3) the process is confidential; and (4) the district initiates rehabilitation, not punishment, if the test results are positive. School Law News, Jan. 19, 1989, p.8.

[20] Supra note 16 at 1508 ("School bus drivers or mechanics directly responsible for the operation and maintenance of school buses might reasonably expect to be subject to urine and blood tests not required of other bus drivers without particularized suspicion."). See also Jenkins v. Jones, supra note 7.

[21] City of Palm Bay v. Bauman, 475 So.2d 1322 (Fla. App. 1985) (annual or other specified physical examinations for police officers and firefighters).

[22] See Patchgue-Medford Congress of Teachers cited supra note 14. It is unclear whether a union may in effect waive the constitutional rights of the individual members of the bargaining unit.

[23] 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

student should depend on the reasonableness, under all circumstances of the search."[24]

The Court developed a two part test to determine reasonableness: (1) was the search justified at its inception (i.e., did the searcher have reasonable suspicion); (2) was the search as actually conducted reasonable in scope (i.e., was the search more intrusive than it had to be and was the type of search related to the object to be found). In setting out its test, the Court recognized that students have some privacy rights guaranteed by the Fourth Amendment, but not to the extent that schools are hampered in maintaining a secure and orderly educational environment. The Court concluded that the higher probable cause standard which police must follow in dealing with criminals is unsuited to the school environment; the manner in which the assistant principal had conducted his search was overall a reasonable one. The Court directed school officials to use their good judgment in applying the reasonableness standard. The Court added, however, that searches can not be excessively intrusive in light of the student's age and sex and the nature of the infraction.

Drug Testing of Students

According to the U.S. Supreme Court in T.L.O., the permissible regulatory scope of school officials extends only to maintaining discipline in the classroom, on school grounds, and during school functions.[25] Drug tests that only show the ingestion of marijuana in previous days or weeks are "an improper attempt by school officials to regulate off-campus conduct unrelated to school order or discipline."[26] While the use of drugs by school students is to be condemned, "such conduct is within the realm of parents and law enforcement officials, not teachers and educational administrators."[27]

The primary objective in requiring students to submit to drug testing is to detect substance abuse. Three separate student drug testing programs have been challenged in court:

(1) a program attempting to test the entire student body without individualized suspicion of drug use;

(2) a program attempting to test selected students based upon individualized suspicion of drug use; and

(3) a voluntary program attempting to test only student athletes.[28]

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[24] New Jersey v. T.L.O., 105 S.Ct. at 733.

[25] See Claiborne v. Beebe School Dist., 687 F.Supp. 1358 (E.D. Ark. 1988) (striking down a school district alcohol and drug policy that provided for expulsion of any student using drugs or alcohol "prior to" coming on school property on the grounds that the policy was unconstitutionally vague and overbroad).

[26] Supra note 12, at 40.

[27] Id. at 41. For a discussion on urinalysis, see endnote, p. 11.

[28] A federal court barred a Texas school district from mandatory drug testing of all students taking part in extracurricular activities. School officials, noting that discipline referrals dropped 80 percent after the drug testing policy was announced, voted to appeal the decision.

The New Jersey and Arkansas courts that evaluated the first and second programs, respectively, applied the T.L.O. analysis and concluded that urine testing was a violation of the Fourth Amendment.

(1) **Testing programs based on no individualized suspicion**

A testing program that requires all students in a district to submit to urinalysis as part of an annual physical examination, based upon no individualized suspicion, violates students' rights to privacy and to be free of unreasonable searches and seizures. In Odenheim v. Carlstadt-East Rutherford Regional School Dist.,[29] the school district established a policy requiring all students to undergo an annual physical examination that included urinalysis. The purpose of the urinalysis was to detect the presence of "controlled dangerous substances." Any student who refused to take a urine test, or whose urine test indicated drug or alcohol use, was subject to disciplinary action, including suspension or expulsion.

In response to a challenge of the testing program by a group of parents and students, the school district argued that drug use was an illness and therefore not related to search and seizure rules. The district also argued that because all students were being searched without any discretion on the part of any school official, no individual suspicion was required.

In applying the two-part test developed by the Supreme Court in T.L.O., the court held that even if the district conducted the tests for purely medical reasons, the testing was "not reasonably related in scope to the circumstances which initially justified the interference."[30] The court also found the testing invalid on due process grounds. It observed that automatic suspension or expulsion of students using drugs violated constitutional due process requirements that include informal notice/hearing procedures for suspensions and more formal procedures for expulsions. The court concluded that the district's testing policy was an unconstitutional violation of students' Fourth Amendment rights to privacy, due process and freedom from unreasonable searches and seizures.

(2) **Testing programs based upon individualized suspicion**

A testing program based upon individualized suspicion to detect whether an individual student is under the influence of illicit drugs while at school can be justified only if there is a high probability that a test would disclose evidence of a violation of school rules. In Anable v. Ford,[31] the Arkadelphia High School adopted a policy that prohibited students from selling, distributing, using or possessing drugs or alcohol in school buildings, on school property or at school functions. Students reasonably suspected of wrongdoing were required to submit to blood, breath, urinalysis and polygraph tests. The penalty for violating the policy was voluntarily withdrawing from school with loss of all credit for one semester or being expelled.

The issue of marijuana testing arose when three students agreed under some duress to take

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[29] 211 N.J.Super 54, 510 A.2d 709.

[30] 510 A.2d at 713. The court stated that the urine tests were an attempt to control student discipline under the guise of a medical procedure, and was concerned that accepting this guise would allow testing to become limitless.

[31] 653 F.Supp. 22, modified 663 F.Supp. 149 (W.D. Ark., 1985).

urine tests after a teacher smelled marijuana smoke in a school lavatory and one of the three students in the lavatory claimed that another of the students was holding a marijuana cigarette. The court did not believe that any of the three students had voluntarily consented to take the urine test. The court was critical of the tests because the tests provided no information "as to whether any given student has used marijuana while at school, possessed marijuana at school, or was under the influence while at school"[32], and produced false results. The court concluded that the use of the tests were "an improper attempt by school officials to regulate off-campus conduct unrelated to school order or discipline."[33]

The court was also concerned about the invasive nature of the urine test, which required a student to disrobe from the waist down while an adult official of the same sex watched the student urinate into a tube. The court found constitutional problems with semi-nude body fluid searches, regardless of the purpose of the search and regardless of any popularity of the drug testing policy.

(3) **A voluntary testing program of student athletes**

A voluntary testing program of student athletes generally applies to student athletes and is constitutionally permissible if it is truly voluntary.[34] In Schaill by Kross v. Tippecanoe County School Corp.[35], the school board adopted a drug testing policy requiring all student athletes to consent to submit to a urine test as a condition for participating in interscholastic athletic activities. Coaches were free to randomly test the students' specimens, which were collected without the students being observed. Those students with two positive test results were precluded from participating in some athletic activities, although no academic discipline was imposed and the students' identities remained confidential.

The court found that because athletic activities imposed additional stress on students and increased the probability of injury to athletes and others, the drug testing program was a reasonable means for ensuring a drug-free athletic program. The court observed that student athletes had notice of the urine test, the test was not administered disparately according to race or gender, and the consequence of refusing to submit to a test was merely loss of a voluntary activity the court regarded as a privilege, not a fundamental right.

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[32] Id. at 40.

[33] Id.

[34] But see supra note 28 regarding mandatory drug testing of all students participating in extracurricular activities.

[35] 679 F.Supp. 833 (N.D. Ind. 1988).

Endnote

Urinalysis is the prevailing and cheapest method of drug testing. The reliability of urinalysis to determine substance abuse is a matter of some controversy:

(1) while alcohol, marijuana and cocaine are the three most commonly targeted drugs, the variety of drugs available today far exceeds the capability of any one test to detect them;

(2) the three-to-five percent error rate of the enzyme multiplied immunoassay test (EMIT), the most widely used test, can increase with the mishandling or accidental contamination of samples during analysis;

(3) the reliability of test results relates directly to the quality of the laboratory doing the work and until recently there were no certification standards for drug testing laboratories;

(4) attempts to ensure specimen integrity by having a school official witness the collection of an individual's specimen raise significant ethical and legal issues for both the observer and the observed (an individual has a right to dispose of urine in a manner that is respectful of the individual's privacy);

(5) the standard for what constitutes a "positive" finding must be meaningful since laboratory analysis can reveal whatever school officials want to know and will finance (if a standard is set too low, a student may test positive due to passive inhalation of marijuana while attending a weekend rock concert); and

(6) because test results measure the enzymes into which drugs are metabolized, and not the level of intoxication or extent of impairment, observation (indications of drug use include slurred speech, dilated pupils, slowed movements) remains the single most effective method of determining whether a student's school performance is impaired by substance abuse.